

1 HONORABLE RICHARD A. JONES  
2 TRIAL DATE: FEBRUARY 24, 2020  
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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT SEATTLE

11 KIMBERLY ANN JOHNSON,

12 Plaintiff,

13 v.

14 ALBERTSONS, LLC,

15 Defendant.

16 Case No. 2:18-cv-01678-RAJ

17 **PLAINTIFF'S TRIAL BRIEF**

18 **I. INTRODUCTION**

19 Plaintiff Kimberly A. Johnson filed this lawsuit in King County Superior Court on October  
20 24, 2018 after being fired from employment by Defendant Albertsons LLC on April 5, 2018. Within  
21 thirty days of filing the complaint, Albertsons removed the case to federal court on the basis of a  
22 federal question. Ms. Johnson's lawsuit alleges gender/sex discrimination and retaliation under 42  
23 U.S.C. § 2000e, Title VII of the Civil Rights Act of 1964, as amended in 1991 and RCW 49.60 *et*  
24 *seq.*, Washington Law Against Discrimination. She is seeking damages for her economic losses and  
25 emotional distress damages under state and federal law. She is seeking punitive damages for  
Defendant's reckless disregard of her federally protected rights under federal law.

## II. STATEMENT OF FACTS (Abbreviated)<sup>1</sup>

Ms. Johnson began her employment with Defendant Albertsons in 1983. She rose through the ranks to become a District Manager overseeing the operations of between 18 and 21 stores by 2001. Ms. Johnson spent the final 17 years of her employment with Albertsons in management capacities; 15 of those years were devoted to her District Manager duties.

In December 2015, Albertsons merged with Safeway. The combined companies became known as Albertsons. Ms. Johnson was employed by Albertsons LLC from December 2015 to April 2018 when Defendant Albertsons terminated her employment.

After the merge of Albertsons and Safeway, Defendant Albertsons assigned Ms. Johnson the position of District Manager of District 24 overseeing both Albertsons and Safeway grocery stores located in North Seattle and South Everett in the Seattle Division of Albertsons. The stores she was assigned to manage were in relatively poor physical shape and the sales history was mediocre.

Shortly after the merge, Robert Backus was promoted to Senior Vice President of the Seattle Division. Mr. Backus had approximately fourteen direct reports in the operations section of his responsibilities—five of those managers were female. Within a little over a year of his promotion, Mr. Backus fired a female Area Vice President, demoted two female District Managers, and caused a third District Manager to complain that she had a “target on her back.” By the late spring 2017, Ms. Johnson and Jackie Katanik were the only female District Managers in the Seattle Division.

Ms. Johnson began discussing her concerns about Mr. Backus's treatment of female managers with Human Resources Director Trevor Ennis in March 2017. Within weeks of voicing her concerns about gender discrimination to Mr. Ennis, Dave Carlson, one of Ms. Johnson's grocery Store Directors threatened to resign his 30-year career with Albertsons because of poor treatment by Seattle Division Management—especially Area Vice President Kenny Smith and Senior Vice

<sup>1</sup> The Court recently ruled on the parties' respective summary judgment motions. Plaintiff Johnson incorporates the facts recited in her response to Defendant's Motion for Summary Judgment rather than duplicating those facts in this brief. Dkt. No. 38.

1 President Rob Backus. Mr. Carlson contacted the corporate office in Boise, Idaho to talk to Human  
 2 Resources Vice President Peggy Jones and Operations Vice President John Ortiz. Mr. Ortiz called  
 3 Ms. Johnson to discuss ways to convince Mr. Carlson to continue his position as Store Director.  
 4 During the conversations between Mr. Ortiz and Ms. Johnson, Ms. Johnson told Mr. Ortiz about her  
 5 concerns about Rob Backus's treatment of female managers in the Seattle Division. Thereafter, Mr.  
 6 Ortiz conveyed Ms. Johnson's concerns to Mr. Backus's immediate supervisor, Karl Schroeder,  
 7 President of the Seattle Division of Albertsons.

8 Each quarter, Albertsons prepares financial projections for every grocery store in the Seattle  
 9 Division. Rob Backus and Kenny Smith worked with Finance Manager Jeffrey Glazer to finalize  
 10 the projections. In June 2017, after Ms. Johnson voiced her concerns about gender discrimination  
 11 to Mr. Ennis, Mr. Backus and Mr. Smith instructed Mr. Glazer to "push" Ms. Johnson's store's  
 12 projections 2 to 3 percent higher than the previous years' data warranted. Mr. Glazer will testify  
 13 that this kind of across-the-board "push" for all stores was "extraordinary" and never happened  
 14 before. The result was that Mr. Johnson's district stores suffered labor shortages, which in turn  
 15 adversely affected the performance of all of the stores in her district.

16 In October 2017, Mr. Backus and Mr. Smith informed Mr. Schroeder of Ms. Johnson's  
 17 District's poor performance. After she refused to quit, Mr. Schroeder directed that Ms. Johnson be  
 18 placed on a performance improvement plan (PIP). The plan was so onerous that there was no way  
 19 for her to meet all the detailed performance standards imposed on her. In January 2018, before Ms.  
 20 Johnson completed the PIP, Albertsons began advertising for her replacement.

21 In December 2017, the projections for District 24 were much more realistic. Ms. Johnson's  
 22 district's performance began to improve. Despite the improvements, Albertsons fired the 34-year  
 23 veteran in April 2018.

24 Just days before Ms. Johnson's termination, Mr. Backus and Mr. Smith toured the grocery  
 25 store managed by Mr. Carlson. They told Mr. Carlson that his store was a 3 out of 10—meaning  
 26 well below the standard of 8+ that management wanted. The day after Ms. Johnson's termination,

1 Mr. Backus and Mr. Smith again toured the store that was in exactly the same condition as it had  
 2 been when they characterized it as a 3. Now, however, both Mr. Backus and Mr. Smith  
 3 enthusiastically informed Mr. Carlson that the store was an 8 or 9.

4 Ms. Johnson was replaced by Bret Podnar. Immediately after her termination, five new stores  
 5 were placed in District 24—four of which were very high performing stores. Three under-  
 6 performing stores, that Ms. Johnson had been recommending be closed for years, were closed. The  
 7 result was that District 24, with realistic projections, five new stores, and the closure of poor  
 8 performing stores, became a high-performing district in the Seattle Division. It is managed by a  
 9 man.

### 10 III. ARGUMENT OF COUNSEL

#### 11 A. Sex Discrimination – Motivating Factor under Title VII.

12 A sex discrimination action under Title VII may be proved by a preponderance of the  
 13 evidence that can be direct or circumstantial. The U.S. Supreme Court has held that circumstantial  
 14 evidence is sufficient to support a violation of Title VII. *Desert Palace v. Costa*, 539 U.S. 90, 100  
 15 (2003).

16 Albertsons claims that neither Ms. Johnson nor any of her female colleagues were subjected  
 17 to sex discrimination. It alleges that the terminations and demotions of female managers was based  
 18 on performance issues. Defendant's claim is undermined by the series of performance evaluations  
 19 its management personnel completed on Ms. Johnson's performance, all of which characterize her  
 20 efforts as "meets expectations" of the employer. If the jury finds that the Defendant's explanation  
 21 for Ms. Johnson's termination is unworthy of belief, that would constitute circumstantial evidence  
 22 of Albertsons' discriminatory animus toward female employees. *Reeves v. Sanderson Plumbing*  
 23 *Products, Inc.*, 530 U.S. 133, 147 (2000) (this form of circumstantial evidence "may be quite  
 24 persuasive"). As reflected in Plaintiff's response to summary judgment, there is more than sufficient  
 25 evidence to support a finding of gender based discrimination.

1                   **B. Gender Discrimination under the Washington Law Against Discrimination.**

2                   In order to prevail at trial on a gender discrimination claim under the WLAD, a Plaintiff must  
 3 demonstrate, by a preponderance of the evidence, that gender was a substantial factor motivating  
 4 the employer's discriminatory conduct. *Scrivener v. Clark College*, 181 Wn.2d 439, 446-47, 334  
 5 P.3d 541 (2014); *see also, Mikkelsen v. Public Utility District No. 1 of Kittitas County*, 189 Wn.2d  
 6 516, 534-35, 404 P.3d 464, (2017) (summary judgment reversed on plaintiff's gender claim where  
 7 27-year veteran management female employee treated disrespectfully by new male supervisor by  
 8 speaking over her in meetings, denigrating her in front of her staff and peers, calling her  
 9 untrustworthy, treating her differently than male managers, was ultimately terminated from her  
 10 employment).

11                   **C. Retaliation – Reasonable Belief.**

12                   Under both state and federal law, a Plaintiff may prove retaliation for engaging in protected  
 13 conduct if he or she had a reasonable belief that the facts complained about constituted an unlawful  
 14 employment practice. *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir 1994) (“The reasonableness of  
 15 [Plaintiff’s] belief that an unlawful employment practice occurred must be assessed according to an  
 16 objective standard - one that makes due allowance, moreover, for the limited knowledge possessed  
 17 by most Title VII plaintiffs about the factual and legal bases of their claims. We note again that a  
 18 reasonable mistake may be one of fact or law”).

19                   Title VII encourages employees to report actions that they reasonably believe are  
 20 discriminatory, even if those actions are in fact lawful. *Passantino v. Johnson & Johnson*, 207 F.3d  
 21 599, 612 (9th Cir. 2000) (citing *Moyo v. Gomez*, 40 F.3d at 985). While the Washington pattern  
 22 jury instruction includes “reasonable belief” language (Washington Pattern Instruction 330.05), the  
 23 Ninth Circuit Model Instruction does not (Ninth Circuit Model Instruction 10.3). Adding reasonable  
 24 belief to the Ninth Circuit Model Instruction conforms with federal law.

25                   Here, Ms. Johnson not only observed gender-based discrimination, she was told by many  
 26 co-workers it was their experience and judgment that Albertsons had a pattern and practice of

1 discrimination on the basis of gender. Those conversations with co-workers support her reasonable  
 2 belief that there existed gender discrimination in the workplace.

3 **D. Testimony about Fair Treatment for Women by Defense Managers.**

4 Albertsons proposes to elicit testimony from several female employees extolling the virtues  
 5 and fair management treatment they have received from Seattle Division leadership, to include Karl  
 6 Schroeder, Rob Backus, and Kenny Smith. Even if true, the proposed testimony would not be  
 7 relevant to Ms. Johnson's claim of sex/gender discrimination under federal and state law. Ms.  
 8 Johnson does not have to prove that Albertsons discriminated against *all* employees, only Ms.  
 9 Johnson. *Diaz v. American Tel. & Tel.*, 752 F.2d 1356, 1361 (9th Cir. 1985) ("It is clear that  
 10 Congress never intended to give an employer license to discriminate against some employees on the  
 11 basis of race or sex merely because he favorably treats other members of the employees' group.")  
 12 (citing *Connecticut v. Teal*, 457 U.S. 440, 455 (1982)). Two of the female managers whose testimony  
 13 Albertsons proposes to offer at trial were placed in District Managers positions after Albertsons was  
 14 apprised that Ms. Johnson claimed gender discrimination in the workplace. The *Diaz* Court  
 15 addressed that issue as follows:

16 When the individual who was promoted receives the challenged position only after  
 17 the plaintiff has filed a discrimination charge, the fact that both individuals are  
 18 members of the same protected class does not rebut the otherwise established  
 inference of discrimination.

19 *Diaz*, 752 F.2d at 1361; *Tsai v. AT & T Mobility, LLC*, WL 666939, at \*2 (W.D. Wash. March 11,  
 20 2009). While it is laudable that Albertsons is promoting female employees into District Manager  
 21 positions, its motives are suspect since it is in the throes of litigation over gender discrimination.  
 22 This testimony is irrelevant, suspect, and would be unfairly prejudicial. See Fed. R. Evid. 402, 403.

23 **E. Mitigation of Damages. The Defendant's Expert Report Lacks both Factual and Legal  
 24 Foundation Sufficient to Support the Affirmative Defense of Failure to Mitigate  
 Damages.**

25 The Defendant has offered a report from an expert witness on the affirmative defense of  
 26 failure to mitigate damages. Ms. Johnson filed a motion in limine seeking to limit the testimony of

1 Albertsons' proposed expert, William Skilling. This was not a motion to exclude pursuant to  
 2 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The essence of the *Daubert* holding  
 3 and their progeny is the reliability of scientific methods. *See Murray v. Southern Route Maritime*  
 4 *SA*, 870 F.3d 915, 922 (9th Cir. 2017) (reliability depends on "whether the reasoning or methodology  
 5 underlying the testimony is scientifically valid") (quoting *Daubert*, 509 at 592-93). In *Daubert*, the  
 6 Court identified four factors to determine whether the underlying testimony is scientifically valid:  
 7 "(1) whether the theory can be and has been tested, (2) whether the theory has been peer reviewed  
 8 and published, (3) what the theory's known or potential error rate is, and (4) whether the theory  
 9 enjoys general acceptance in the applicable scientific community." *Id.*, (quoting *Daubert*, 509 at  
 10 593-94, 113 S.Ct. 2786.

11 The Skilling report is not a scientific analysis. It is merely a compilation of national and  
 12 local job categories cobbled together with internet searches leading Mr. Skilling to his unsupported  
 13 opinion that Ms. Johnson failed to mitigate her damages and that she should have been employed  
 14 within six months.

15 Approximately two months after Mr. Skilling rendered his opinion regarding Ms. Johnson's  
 16 re-employment efforts in this case, Judge Coughenour excluded Mr. Skilling's expert report and  
 17 testimony as insufficient "evidence to support a conclusion that there were suitable positions  
 18 available for an applicant with Plaintiff's transferable skills and years of experience." *Erickson v.*  
 19 *Biogen, Inc.*, C18-1029JCC (W.D. Wash. October 19, 2019). The Court in *Erickson* found that  
 20 "(b)oth the national statistics and Skilling's Indeed.com results fail to narrow their data . . . to  
 21 positions that are 'substantially equivalent' to Plaintiff's previous job." *Id.*, (quoting *Ford Motor*  
 22 *Co. v. E.E.O.C.*, 458 U.S. 219, 232 (1982)). Mr. Skilling's proffered testimony in *Erickson* is  
 23 virtually identical to that in Ms. Johnson's case. In his report about Ms. Johnson's mitigation efforts,  
 24 Mr. Skilling recited Standard Occupational Classifications for six job classifications from a 2018  
 25 annual wage report published by the Bureau of Labor Statistics. Dkt. No. 51-1, p.49. He then cited  
 26 what he calls "employment outlook data" published by the Washington Occupational Information

1 System, which “estimates” employment for 2019 in King County in those same generic job  
 2 classifications he cited from the Bureau of Labor Statistics report. *Id.*, p. 50. Next, he “conducted  
 3 several keyword searches on [www.indeed.com](http://www.indeed.com)” using the six generic categories he was analyzing.  
 4 *Id.*, p. 51. He provides no specifics about the alleged employment opportunities, nor whether any  
 5 of those opportunities actually existed. Mr. Skilling makes no attempt to discern the required  
 6 qualifications of any of the jobs, the job duties of any job, or the compensation of any of the job.  
 7 Without these essential details, Mr. Skilling presents insufficient evidence to demonstrate there were  
 8 “suitable positions available for an applicant with Plaintiff’s transferable skills and years of  
 9 experience.” *Erickson v. Biogen, Inc., supra*. A jury would be left to guess whether there were  
 10 actually jobs Ms. Johnson could obtain (without a high school diploma), whether the duties of  
 11 alleged job openings were comparable to those at Albertsons, and the amount of compensation she  
 12 would have been able to realize from any such job. As in *Erickson*, Mr. Skilling’s testimony is  
 13 insufficient to support the affirmative defense of failure to mitigate damages, and it should be  
 14 excluded.

15 **F. Frivolous Affirmative Defenses.**

16 The Defendant continues to rely upon frivolous affirmative defenses, including, good faith,  
 17 *Faragher/Ellerth* affirmative defense, and legitimate, non-retaliatory reasons. *See* Dkt. No. 57, p.  
 18 4. These affirmative defenses are being presented for the improper purpose of increasing the costs  
 19 of litigation and are unwarranted by existing law or by any non-frivolous argument for the extension  
 20 or modification of existing law. Fed. R .Civ. P. 11(b). The Court should award monetary sanctions.  
 21 Fed. R. Civ. P. 11(c).

22 **1. Good faith.**

23 Albertsons asserts that it “engaged in good faith efforts to comply with Title VII. Albertsons  
 24 argues that the conduct complained of by Plaintiff, if performed or carried out, was performed or  
 25 carried out in good faith based upon reasonable grounds for believing that such conduct was not in  
 26

1 violation of Title VII.” Dkt. No. 57, p. 4. There is no qualified immunity or “good faith” defense to  
 2 claims under Title VII.

3 To prevail, Plaintiff must simply prove that either gender discrimination or retaliation was a  
 4 substantial factor under Washington law, See WPI 330.01 and 330.05, or a motivating factor under  
 5 federal law. *See* Model Ninth Circuit Instruction No.10.3. Good faith is not a defense to a claim  
 6 under either Title VII or the WLAD. In reference to punitive damages, Plaintiff has the burden of  
 7 proof. The Ninth Circuit model instruction provides: “Conduct is in reckless disregard of the  
 8 Plaintiff’s rights if, under the circumstances, it reflects complete indifference to the Plaintiff’s safety  
 9 or rights, *or if the Defendant acts in the face of a perceived risk that its actions will violate the*  
 10 *Plaintiff’s rights under federal law.*” Model Instruction 5.5.

11       **2. *Faragher/Ellerth* affirmative defense.**

12 Albertsons asserts as an affirmative defense that it “has in place a clear and well-  
 13 disseminated policy against discrimination and retaliation, and a reasonable and available procedure  
 14 for handling complaints thereof, which provides for prompt and effective responsive action. Plaintiff  
 15 unreasonably failed to take advantage of the preventive or corrective opportunities provided by  
 16 Albertsons or to avoid harm otherwise.” Dkt. No. 57, p. 4. This is affirmative defense is  
 17 inapplicable to the Plaintiff’s claims and is frivolous.

18       In *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998) and  
 19 *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 141 L.Ed.2d 662 (1998), the Court established a  
 20 two prong affirmative defense for claims of *harassment* by non-management employees: (a) that  
 21 the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and  
 22 (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective  
 23 opportunities provided by the employer or to avoid harm. *Faragher*, 524 U.S. at 806; *Ellerth*, 524  
 24 U.S. at 765. Ms. Johnson, however, makes no claim for harassment. Moreover, only managerial  
 25 employees are alleged to have violated any of Plaintiff’s rights.

1                   **3. Legitimate, non-retaliatory reasons.**

2                   Albertsons asserts that “[a]ll employment decisions regarding or affecting Plaintiff were  
 3 based upon legitimate, non-retaliatory, and reasonable business reasons that were in no way related  
 4 to Plaintiff’s gender or any alleged protected activity.” This is not an affirmative defense.

5                   Plaintiff has the burden to prove under Washington law that gender or retaliation was a  
 6 substantial factor in the decision to take adverse action. It need not be the only factor or reason.  
 7 See WPI 330.01. Under Title VII, Plaintiff must prove discriminatory or retaliatory intent played  
 8 any role in a defendant’s decision to terminate her employment, even if it is merely one factor and  
 9 not the sole cause of the decision. 42 U.S.C. § 2000e-2(m); *National Association of African*  
 10 *American-Owned Media v. Charter Communications, Inc.*, 915 F.3d 617, 626 (9th Cir. 2019).  
 11 Therefore, a legitimate non-discriminatory or non-retaliatory reason, while relevant, is not a defense  
 12 to liability. Under both state and federal law, Plaintiff can prevail if a discriminatory reason  
 13 motivated the adverse employment action even if there also existed a legitimate non-discriminatory  
 14 reason. Moreover, this is not an affirmative defense.

15                   **G. Equal Opportunity Bully.**

16                   Albertsons appears to argue that Kenny Smith and maybe Rob Backus do not discriminate  
 17 against female employees because of their gender, but rather because they are “equal opportunity”  
 18 bullies. While it is true that Mr. Smith appears to fall into that noxious category and that Mr. Backus  
 19 is imperious and supercilious, the evidence will show that their abusive conduct toward women was  
 20 considerably worse than toward men.

21                   “[I]t is error to conclude that harassing conduct is not because of sex merely because the  
 22 abuser ‘consistently abused men and women alike.’ *E.E.O.C. v. Nat'l Educ. Ass'n. of Alaska*, 422  
 23 F.3d 840, 845-46 (9th Cir. 2005) (quoting *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463  
 24 (9th Cir.1994)). The Court noted the qualitative difference in the abuse sustained by men and  
 25 women in determining that the abusive conduct of the Alaska NEA director had a more substantive  
 26 effect on women than men. *N.E.A. of Alaska*, 422 F.3d at 846. As with the *N.E.A. of Alaska* case,

1 both Mr. Smith and Mr. Backus were abusive to some men, but while Mr. Backus's treatment of  
 2 women included both disrespectful and disdainful conduct, he also effected both demotions and  
 3 terminations of only female managers under his supervision.

4 **H. Fed. R. Evid. 1006.**

5 Albertsons proposes to introduce thousands of pages of what appear to be excel spreadsheets  
 6 with summaries and graphs pursuant to Fed. R. Evid. 1006. Plaintiff has objected to all the  
 7 thousands of pages of documents and the summaries as inadmissible hearsay. There is nothing  
 8 inherent in the document to demonstrate that they are admissible under any exception to hearsay  
 9 prohibitions. Without a demonstration that the underlying documents are admissible, the summaries  
 10 are inadmissible, as well. *See United States v. Johnson*, 594 F.2d 1253, 1254-57 (9th Cir. 1979)  
 11 *cert. denied*, 444 U.S. 964 (1979). ("Where summary proof is offered, ordinarily it amounts to  
 12 'evidence,' particularly where the underlying material was not itself admitted or was not as a  
 13 practical matter examinable by the jury. In such cases, it is especially important to ensure that the  
 14 summary rests entirely upon admissible evidence.") Fed. R. Evid. 1006 evidence normally is  
 15 objectionable if the source material on which the summary is based is inadmissible. *United States*  
 16 *v. Milkiewicz*, 470 F.3d 390, 395-96 (1st Cir. 2006) (citing 31 Charles A. Wright & Victor J. Gold,  
 17 Federal Practice and Procedure § 8043, at 521-22 (2000)).

18 A Fed. R. Evid. 1006 proponent must show that the voluminous source materials are what  
 19 the proponent claims them to be and that the summary accurately summarizes the source materials.  
 20 *Milkiewicz*, 470 F.3d at 395-96 (citing 31 Wright & Gold Federal Practice § 8043, at 525). The  
 21 Defendant will be unable to make the necessary showing.

22 **I. Untimely Pre-Trial Order Additions.**

23 The Proposed Pretrial Order was filed on February 10, 2020. The Defendant originally  
 24 proposed 295 exhibits. On February 7, the Friday before the Pretrial Order was to be filed, the  
 25 Defendant notified Plaintiff that it was withdrawing 87 exhibits. Plaintiff's counsel spent much of  
 26 that weekend re-examining the exhibits to determine what exhibits were withdrawn and what

1 remained. The day after the parties filed the Proposed Pre-trial Order, Defendant Albertsons  
 2 contacted Plaintiff's counsel asking counsel to sign off on an additional eight exhibits which  
 3 comprised of thousands of more pages of excel spreadsheets and summaries to Defendant's  
 4 proposed exhibits. When Plaintiff's counsel objected, Defendant merely filed the additional exhibits  
 5 without either an order from the Court or an agreement of the parties in contravention of LCR  
 6 16.1(d) ("Action by the Court"). No statement of manifest injustice was filed by Defendant.  
 7 Plaintiff objects to the untimely submission of thousands of pages of exhibits.

8 **J. The Dean Report contains an Inadmissible Legal Conclusion and is Inadmissible  
 9 Hearsay and not a Business Record of Regularly Conducted Activity.**

10 The Dean Report dated February 18, 2018 was prepared by a private attorney in anticipation  
 11 of litigation after Ms. Johnson complained to Bob Miller, the then President of Albertsons, of gender  
 12 discrimination and retaliation in the workplace. Ms. Dean submitted her report to Albertsons in-  
 13 house counsel and labeled it "Confidential and Privileged – Attorney Client Communication." Between  
 14 the time Ms. Johnson communicated with Mr. Miller and the issuance of the Dean Report, Steve  
 15 Mohrweis, Albertsons Director of Finance, had announced that Albertsons needed to increase  
 16 its legal accrual because Kim Johnson was going to sue the company. Dkt. No. 40-1, p.50. Clearly,  
 17 the Dean Report was commissioned in anticipation of litigation and makes the report itself and all  
 18 of its conclusions untrustworthy.

19 Albertsons' relies *United States v. Childs* for the proposition that a business record is  
 20 admissible even if prepared by a third-party vendor in its opposition to Plaintiff's motion in limine  
 21 to exclude the Dean Report. *United States v. Childs*, 5 F.3d 1328, 1334 (9th Cir. 1993). While that  
 22 proposition may be accurate, the holding in *Childs* does not support Aldersons' argument. In *Childs*,  
 23 the defendant was accused of possession of stolen vehicles that he registered under a false name in  
 24 Alberta, Canada. The trial court admitted, over the defendant's objection, license plate applications  
 25 maintained by the Alberta, Canada DMV and ownership documentation maintained by the auto  
 26 dealers from whom the defendant was accused of stealing. The court found these types of records

1 provided by a vendor to be kept in the regular course of the motor vehicle licensing business, in the  
 2 regular practice of that business, and trustworthy. *Childs*, 5 F.3d at 1334. *See also, MRT Const. Inc.*  
 3 *v. Harddrives*, 158 F.3d 478, 483 (9th Cir. 1998) (Court affirmed admission of legal bills in a breach  
 4 of contract claim where business received and maintained legal bills in the regular course of business  
 5 and relied on their accuracy). In contrast, the Dean Report, a privileged communication from a  
 6 outside lawyer investigating a claim of discrimination and retaliation at a time when the employer  
 7 anticipated litigation. The report is neither trustworthy nor was it maintained in the regular course  
 8 of Albertsons' grocery business.

9 When Ms. Johnson requested all documents related to investigations of discrimination  
 10 during the past five years in discovery, Albertsons objected claiming all such documents were  
 11 attorney-client or work product privileged. Mindenbergs decl., Ex. A. Ultimately, Albertsons  
 12 released the Dean Report because it comported with their legal strategy. Nevertheless, the Dean  
 13 Report does not meet the requirements for the records exception to the hearsay prohibition under  
 14 any scenario. Moreover, the Dean report is replete with hearsay, double hearsay, opinions about the  
 15 credibility of witnesses, and opinions about the ultimate fact at issue. It invades the province of the  
 16 jury.

17 **K. Subordinate Bias Liability of Employer.**

18 Where a supervisor is motivated by discriminatory or retaliatory animus that is intended by  
 19 the supervisor to cause an adverse employment action, and if that act causes the adverse action, the  
 20 employer is liable under the law. *See Straub v. Proctor Hospital*, 562 U.S. 411, 422 (2011). In  
 21 *Staub*, the plaintiff's immediate supervisors had discriminatory animus because of his service in the  
 22 military reserves. *Id.*, at 414. The supervisors made false allegations against Mr. Staub to the Vice  
 23 President of Human Resources, which ultimately resulted in Mr. Staub's termination from  
 24 employment by the H.R. vice president, who had no bias against Mr. Staub for his military  
 25 obligations. *Id.*, at 414-15. The Court rejected defendant's cat's paw argument that the supervisors'  
 26 actions had to be the singular influence in the decision to terminate Mr. Staub. Instead, the Court

1 reasoned that the underlying USERRA statutes were similar to Title VII that requires that  
 2 discrimination need be a motivating factor in the adverse employment to hold the employer liable.  
 3 *Id.*, at 417. Moreover, the Court found that where the supervisors' conduct was discriminatory and  
 4 ultimately caused the adverse employment action, the employer is liable because the supervisor is  
 5 an agent of the employer especially where the supervisors' actions were "designed and intended" to  
 6 cause the adverse employment action. *Id.*, at 420. See also, *Boyd v. Washington State Department*  
 7 *of Social and Health Services*, 181 Wn. App. 1, 20, 349 P.3d 864 (2015).

8 Here, it appears that Karl Schroeder, Albertsons' Seattle Division President, made the  
 9 decision to terminate Ms. Johnson's employment. It is undisputed that Rob Backus, Senior V.P.,  
 10 made the recommendation to terminate Ms. Johnson. Although there is independent evidence that  
 11 Mr. Schroeder harbored retaliatory animus against Ms. Johnson for complaining about Mr. Backus,  
 12 the record demonstrates that Mr. Backus was the driving force behind jettisoning Ms. Johnson from  
 13 her 34-year employment with Albertsons.

14 Mr. Backus displayed contempt for Ms. Johnson in front of her peers and subordinates, he  
 15 approved the "pushing" of her sales projections to undermine her ability to adequately staff the  
 16 grocery stores that she managed, he engaged in the termination and demotion of all but one of the  
 17 female managers in the operations section of the Seattle Division under his control. When Ms.  
 18 Johnson's District 24 predictably had difficulty after Mr. Backus approved the sales projections be  
 19 "pushed," he reported those difficulties to Mr. Schroeder. Based on Mr. Backus's recommendation,  
 20 Ms. Johnson was fired. These facts implicate the quintessential "subordinate bias liability" theory.  
 21 Even if Mr. Schroeder had no discriminatory or retaliatory bias, Albertsons is liable so long as Mr.  
 22 Backus's intended that his recommendation would result in Ms. Johnson's termination.

#### 23 IV. CONCLUSION

24 Albertsons engaged in discrimination and retaliation against Ms. Johnson in violation of 42  
 25 U.S.C. § 2000e, Title VII to the Civil Rights Act of 1964, as amended in 1991 and the Washington  
 26 Law Against discrimination. She is seeking compensations for the damages caused to her.

1 DATED this 18th day of February 2020.  
2

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1 **CERTIFICATE OF SERVICE**

2 I, Christine A. Thomas, certify and declare that I am now and at all times herein mentioned  
3 was a citizen of the United States and resident of the State of Washington, over the age of eighteen  
4 (18) years, not a party to the above-entitled action, and am competent to testify as a witness. I am  
5 a paralegal employed with the Law Office of Susan B. Mindenbergs. On February 18, 2020, I  
6 electronically filed the foregoing Plaintiff's Trial Brief with the Clerk of the Court using the  
7 CM/ECF system which will transmit a notification of such filing to the following participants:

8 D. Michael Reilly, WSBA No. 14674  
9 Sean D. Jackson, WSBA No. 33615  Legal Messenger  
Beth G. Joffe, WSBA No. 42782  Facsimile  
10 David G. Hosenpud, *pro hac vice*  Electronic Mail  
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15 *Attorneys for Defendant*

17 The foregoing statement is made under the penalty of perjury under the laws of the United  
18 States of America and the State of Washington and is true and correct.

19 DATED this 18th day of February 2020.

21 By: /s/ Christine A. Thomas

22 Christine A. Thomas, Paralegal  
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